IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7042 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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DIVISIONAL RLY MANAGER & 1 - Petitioner(s)

Versus

GAURISHANKER A VAIDYA & 1 - Respondent(s)

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Appearance :
MR RM VIN for Petitioner(s) : 1 - 2.
RULE NOT RECD BACK for Respondent(s) : 1,
None for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 09/01/2006

ORAL JUDGMENT

1. This petition is filed under Articles 226 and 227 of the Constitution of India, challenging

the order passed by the Central Government Labour Court at Surat in Application No.76 of 1986 on 7.1.1988.

2. It is the case of the petitioners that the respondent No.1 was working prior to his retirement on 10.9.1960 as a Booking Clerk in the Commercial Department. The respondent No.1 was originally appointed by the Bombay, Baroda and Central India Railway, as Assistant Coaching Clerk on 7.2.1927. He was thereafter confirmed in that post on 1.8.1928. The respondent No.1 showed his date of birth as 6.2.1906. The respondent No.1 retired with effect from 10.9.1960 when he was working as a Booking Clerk. Since on the basis of the consideration of the respondent No.1's record, the competent authority was of the opinion that the respondent No.1 was not fit to be continued further in service and it was therefore decided

to retire respondent No.1 with effect from 10.9.1960.

3. It is also the case of the petitioner that the respondent No.1 after having relied upon the Railway Board's letter dated 5.12.1962 and the decision of Hon'ble Supreme Court in the case of Railway Board vs. Pitchumani (1972)(I) LLJ 112, has filed Special Recovery Application No.76 of 1986 under Section 33C(2) of the Industrial Disputes Act, 1947, before the Labour Court (Central) at Surat. It is contended by the respondent No.1 in the said application that the Hon'ble Supreme Court has held that the Ministerial Railway servant, who held a permanent post had right to remain in service upto the age of 60 years. It was also contended therein that the respondent No.1 was governed under Rule 2046 (2)(a) of the Indian Railways Estt. Code Vol.II. Under this rule,

any member of the Ministerial staff who was permanently confirmed prior to 1938 was entitled to remain in service upto the age of 60 years. This was also clear from the Railway Board's letter dated 10.1.1972, and in the said letter, the Railway Board has stated that the Presiding Officer has directed that the age of the compulsory retirement of all the Railway servants should be 58 years, subject to the three exceptions mentioned therein. As against this the petitioner has contended before the Labour Court that the petitioner decided under the said Rule 2046(2)(a) Volume II of the Railway Establishment Code to take action in exercise of the powers vested in the petitioners against the respondents. The respondent No.1 was accordingly at the age of 55 years was asked to retire as he was not in the category of Ministerial Staff. The present petitioners have also filed written statement

in the said application denying and disputing the contentions raised by the respondent No.1. It was, inter alia, contended by the petitioners that the claim of Rs.33,000/- or for any amount is not entertainable and the application is not maintainable in law as the respondent No.1 was not entitled to the benefit of the said judgment.

4. The Labour Court (Central) at Surat has heard the said application from time to time and the learned Labour Judge has passed an order on 7.1.1988 holding that the respondent No.1 having been confirmed prior to 31.3.1938 has a right to be retained in service upto the age of 60 years as per Rule – 2046 of the Railway Establishment Code Volume -II. The respondent No.1 having been retired at the age of 55 years, it was held that he was entitled to get the payment and other allowances for the period

of 5 years from 11.9.1960. The respondent No.2 by the impugned judgment and order directed the petitioners to deposit the amount of Rs.17,429.15 due to the respondent No.1 in the Court within 3 months from the date of the award. It is this order passed by the Labour Court which is under challenge in the present petition.

5. Mr.R.M.Vin, learned advocate appearing for the petitioners has mainly raised two preliminary objections against the maintainability of the petition. He has submitted that though the petitioner was retired on 11.9.1960, the recovery application was filed by the respondent No.1 before the Labour Court (Central) at Surat only in the year 1986. The application was, therefore, filed after more than 26 years. The application should have, therefore, been

rejected by the Labour Court only on the ground of delay and latches. Mr.Vin has further raised the contention that before filing of the Application No.76 of 1986 in Labour Court (Central) at Surat the respondent No.1 has earlier filed an Application No.LC-2/335/84 in the Central Government Labour Court at Bombay which was dismissed by an order dated 3.12.1984 passed by the Presiding Officer, Central Government Labour Court, Bombay. He has submitted that the respondent No.1 has suppressed this fact before the Labour Court (Central) at Surat. It was his duty to point out this fact to the learned Labour Judge at Surat. This omission on the part of the respondent No.1 amounts to a fraud on the Labour Court and it is an abuse of process of the Court. He has, therefore, submitted that on this ground alone the Labour Court should have rejected the applicant's application. He

has further submitted that subsequent application is not maintainable on the ground of principles of res judicata.

6. As far as merits of the matter is concerned, Mr.Vin has submitted that the Labour Judge has totally ignored the submissions made on behalf of the petitioners in the written statement as well as oral submissions made at the time of hearing of the application. He has further submitted that the respondent No.1 belonged to the Commercial Department staff and as such the Hon'ble Supreme Court's decision in the case of Pitchumani's case (Supra) was not applicable to the case of the respondent No.1. He has further submitted that the learned Labour Judge has not decided those issues which were raised by the petitioners with regard to jurisdiction, applicability of the Industrial Disputes Act and maintainability of the application under

the said Act. He has further submitted that the learned Judge has also committed substantial error of law in giving his own definition of ministerial staff contrary to the definition given and accepted and followed by the Railway Administration. He has further submitted that the learned Judge has exceeded his jurisdiction in holding that the Railway Department was not empowered to classify the officials as ministerial and non-ministerial for the purpose of Rule 2046 of the Rules. He has further submitted that the provisions contained in Section 33C(2) of the Industrial Disputes Act are not applicable as there was no pre-existing right of the respondent No.1 to claim the wages and other allowances for the post retirement period. He has, therefore, submitted that the award passed by the Labour Court (Central) at Surat is required to be quashed and set aside.

7. This petition was admitted on 11.2.1992. At the time of admitting the petition and issuing rule this Court has directed that the petition should be heard alongwith Special Civil Application No.466 of 1992. Interim relief was granted in terms of Para-16(b) of the petition on condition that in case the petitioner loses in the petition, the amount required to be paid pursuant to the direction given in the impugned award will be paid to the respondent workman with 12% interest from the date of the award. Despite service of rule nobody appears on behalf of the respondent. This Court has, therefore, issued fresh rule on 4.8.2005. The fresh rule was not served on the respondent No.1 and on 22.12.2005 this Court has passed an order directing the office to place Special Civil Application No.466 of 1992. This Court has also recorded submission made by

Mr.R.M.Vin, wherein it was pointed out that one another cognate matter being Special Civil Application No.1104 of 1988 should also be placed alongwith this matter. Office was, therefore, directed to place the said matter alongwith this matter.

8. As far as Special Civil Application No.1104 of 1988 is concerned, the said matter is already disposed of by this Court on 8.9.2004 and the petition filed by the Railway Board was dismissed. The Court has directed the Labour Court to pay the amount of Rs.13,500/- deposited by the petitioner, with interest accrued thereon, if not withdrawn by the respondent, to the respondent and even to the legal heirs of the respondent in case of death of the respondent. However, in that case the question whether the respondent was entitled to remain in service upto 60 years or 50 years,

was already examined by the Labour Court in earlier order dated 7.3.1984 vide Ex.14 and therefore, that question was not required to be examined by the Labour Court. The Court further observed that the Labour Court examined only the question whether the respondent workman fell under the category of Ministerial Staff or not. Ministerial Staff of Railway Administration has not classified in a particular fashion and therefore, the Court considering nature of work of the respondent, mainly Clerical in nature, the Labour Court has come to the conclusion that the respondent was working as Ministerial Staff and on that basis, the Labour Court passed the impugned order.

9. As far as Special Civil Application No.466 of 1992 is concerned, the said petition is also disposed of by this Court on 14.12.1992. This Court has held that this Court has no

jurisdiction to entertain this petition. It will be open to the petitioner to approach appropriate forum for challenging the order passed in Recovery Application and also the order refusing to set aside the ex-parte in Special Civil Application No.466/1992. So far as present case is concerned, it is an admitted position that the respondent No.1 retired on 11.9.1960. After more than 26 years he has filed the Recovery Application before the Labour Court (Central) at Surat. While filing the said application, the respondent No.1 has not disclosed the fact that the earlier application was filed before the Labour Court (Central) Bombay being an Application No.LC-2/335/84 and the said application was rejected by the Labour Court. While rejecting the said application it was held that if there was a condition and if that condition was not fulfilled, the consequences were bound to be

different and in that case the Court may have jurisdiction to strike down the retirement but when there was no such condition and the discretion is vested with the authorities, the user of discretion cannot be challenged in a proceeding under Section 33C(2) of the Act and the ratio laid down by the Division Bench of Bombay High Court in the case of M.K.Kulkarni is not attracted. The Court, therefore, held that considering the case against the petitioner under Section 33C(2) of the Act challenging the retirement and seeking relief therein would not be maintainable and, therefore, no relief is permissible. The application was, therefore, rejected.

10. Despite the fact that the earlier application was rejected, the respondent No.1 has filed the second application on the same issue before the Labour Court (Surat). This

application is, therefore, not maintainable and the principle of res judicata is squarely applicable to the present case. Even if the respondent No.1 is having very sound case on merits the Court cannot uphold the order passed by the Labour Court in the second application, which is not maintainable at law. Though both the matters referred to above were decided in favour of the respondent confirming the orders passed by the Labour Court, the same course cannot be adopted in the present case. In the present case earlier application was rejected and that fact has not been pointed out. Second application is based on suppression of facts and also barred by the principle of res judicata.

11. Considering the above ground, the Court hereby holds that the impugned award passed by the Labour Court in Application No.76 of 1986

is contrary to the provisions of law and barred by principles of res judicata and hence it deserves to be quashed and set aside. This petition is accordingly allowed. Rule is made absolute without any order as to costs.

(K. A. PUJ, J.)

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